

In the Supreme Court of the  
United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

*Petitioner,*

*vs.*

LOUISIANA,

*Respondent.*

BRIEF OF AMICUS CURIAE  
IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICUS CURIAE

The State of California files this Amicus Brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States.

On November 29, 1976, this Honorable Court issued the following order:

"76-5206 Roberts v. Louisiana. Petition for a writ of certiorari having been granted on November 8, 1976, grant hereby limited to the following question:

" 'Whether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States.' " 97 S.Ct. 482 (1976).

On December 7, 1976, the California Supreme Court in *Rockwell v. Superior Court*, 18 Cal.3d 420, 134 Cal. Rptr. 650, 556 Pac. Rptr. 1101 (1976), struck down this state's special circumstance death penalty legislation as being mandatory and thus in violation of Federal standards.

In pertinent part, the special circumstances legislation in California as set forth in California Penal Code section 190.2 provides:

"The penalty for a person found guilty of first-degree murder shall be death in any case in which the trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:

" . . . .

"(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:

"(1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties."

In California, three persons are presently under a sentence of death for the first-degree murder of a peace officer by reason of the aforementioned section. (*Rockwell v. Superior Court*, *supra*, did not involve the murder of a peace officer.)

Amicus curiae believes that mandatory death sentences for the first-degree murder of a peace officer are not cruel and unusual punishment under the Federal Constitution and that not only in the present legislation but under future legislative enactments, the death penalty for the first-degree murder of a peace officer should be held to be constitutional.

### SUMMARY OF ARGUMENT

In determining whether or not a mandatory death penalty for the first-degree murder of a police officer is constitutional, the test is not to require the Legislature to select the least severe penalty possible, nor to demonstrate a compelling state interest in the selection of that sanction. Rather, such legislative enactments are to be presumed valid. Thus, a heavy burden rests on those who would attack the judgment of the representatives of the people. With this test in mind, mandatory death sentences for the first-degree murder of peace officers must be examined as to constitutionality under the tests set forth by the plurality opinion in *Gregg v. Georgia*, 96 S.Ct. 2909 (1976). This two-prong evaluation involves examining (a) objective indicia that reflect the public attitude towards a given sanction, and (b) whether or not the penalty accords with the "dignity of man." Mandatory death sentences for first-degree murder of police officers are a sanction accepted by the general public. At the time of the common law, a distinction was made between crimes involving private citizen only, and crimes against the body politic. Originally, the death penalty was mandatory. As to those who favor mandatory death sentences, a recent poll shows that the highest number of those who favor mandatory death penalties, favor them for the murder of police officers.

In addition, since the rendering of the decision in 1972 in *Furman v. Georgia*, 408 U.S. 238 (1972), approximately 29 states out of 35 that have reenacted the death penalty created a special category of capital offense which specifies the murder of a peace officer to be either an aggravating factor,

or as in itself a crime requiring a mandatory death sentence. Mandatory death sentences for the first-degree murder of police officers do not offend the dignity of man. Such sentences satisfy both the social functions of retribution and deterrence. Concerning retribution, the people have a right to assert their moral outrage in the killing of a law enforcement officer in the line of duty by demanding a mandatory death sentence.

The interpretation of statistical data bearing on the deterrent effect of death penalties is an issue for the Legislature, which is better equipped to study that issue. It cannot be said that the legislative body of a state government is incapable of making the determination that capital sanctions may deter persons who would otherwise commit murders of peace officers acting in the line of duty. Rather, a legislature may, consistent with its powers and responsibilities, find such a deterrent effect and enact laws predicated thereon. The objections raised to general mandatory death sentences would not apply to the killing of police officers because (a) it is a very narrow category of crime and (b) the offense in itself reflects to some extent on the character of the offender.

In conclusion, it cannot be said that a mandatory death sentence for the first-degree murder of a police officer is excessive because instead of merely striking at an individual, in actuality the murderer in cold blood takes the life of an individual whose duty it is to protect society.

## ARGUMENT

### MANDATORY CAPITAL PUNISHMENT FOR THE FIRST-DEGREE MURDER OF A POLICE OFFICER IS NOT CRUEL AND UNUSUAL PUNISHMENT NOR IS IT VIOLATIVE OF THE FEDERAL CONSTITUTION.

#### A. Standards To Be Used In Determining The Constitutionality Of Mandatory Death Sentences For The First-Degree Murder Of Police Officers.

In determining the issue of whether or not mandatory death sentences for the murder of police officers are constitutional, the test is very narrow and stringent. It is not whether such penalties are advisable or that the least severe penalties are required to be selected. Instead, this clearly is a question for the Legislature to decide. The test was set forth by the plurality in *Gregg v. Georgia*, 96 S.Ct. 2909 at 2926 (1976):

"But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.

" . . . .

"Therefore, in assessing a punishment selected by a democratically-elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people."

In the same manner the plurality said in *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2931:

" . . . Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility

as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."

The test may best be evaluated by reference to the standards set forth by the plurality opinion in *Gregg* which tied the constitutional prohibition against cruel and unusual punishments to "evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2925. The Eighth Amendment standard is accordingly gauged by two criteria: (a) Objective indicia reflecting the public attitude towards, and acceptance of, a given sanction; and (b) Whether the penalty accords with the "dignity of man." The concept of comporting with the "dignity of man" was defined in *Gregg* to require at a minimum that the selected punishment not be excessive. *Ibid.* at 2925. It is urged that mandatory capital punishment for the first-degree murder of a police officer who was acting in the line of duty is both widely accepted and is not excessive, and accordingly is not violative of the Federal Constitution.

**B. Objective Indicia Reflect That Mandatory Death Sentences For First-Degree Murders Of Police Officers Are Accepted As An Appropriate Sanction By The General Public.**

In *Gregg v. Georgia*, *supra*, 96 S.Ct. 2926 et seq., this Court noted that the sentence of death for the crime of murder was a sanction that had been widely accepted by the general public. However, in *Woodson v. North Carolina*, 96 S.Ct. 2978, 2983-90 (1976), the plurality stated that the mandatory punishment of death was not accepted as a sanction by the general populous. Yet the plurality opinions in *Woodson* at 2985-86 n. 25, and *Roberts v. Louisiana*, 96 S.Ct. 3001, 3006, 3007, n.9 (1976) held open the issue of whether certain very narrowly drawn mandatory death sentences such as for intentional murder by a person serving a life sentence, or

by a person previously convicted of an unrelated murder, might be constitutional. It is urged that the first-degree murder of a police officer would similarly fall into a narrow category and accordingly would in fact comply with Federal standards.

As the plurality pointed out in *Woodson v. North Carolina*, *supra*, 96 S.Ct. at 2984, 2985, the practice under the common law and in the United States until the early nineteenth century was to make death the exclusive mandatory sentence for certain specified offenses. However, the common law also distinguished between the enormity of crime perpetrated against the body politic itself as opposed to injuries or crimes committed by private citizens against other private citizens. The epitome of this concept was seen in the law concerning high treason. As William Blackstone stated in the eighteenth century:

"The third species of treason is, 'if a man do levy war 'against our lord the king in his realm.' " And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended. For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in case of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war: . . . But a tumult with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this

being no general defiance of public government. So, if two subjects quarrel and levy war against each other (in that spirit of private war, which prevailed all over Europe in the early feudal times) it is only a great riot and contempt, and no treason. Thus it happened between the earls of Hereford and Gloucester, in 20 Edw. I, who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemeanor." (W. Blackstone, 4 Commentaries \*81, 82.)

This is not to suggest that first-degree murder of a police officer constitutes high treason. Rather, it is clear that in the common law origins of modern law, offenses against the body politic were deemed to be more serious and of greater consequence than crimes involving private individuals because those offenses against the public at large affected the community as a whole and deprecated the lawful passageways by which grievances might be heard.

Thus, when an individual commits a first-degree murder upon a police officer who is acting in the line of duty, his acts constitute an attack upon the lawful functioning of government itself. The common law precept of harsh punishment for those who would attack the body politic by violent and deadly means is reflected today by certain objective indicia of the public attitude towards the death penalty and the first-degree murder of peace officers.

In the June 1973 Harris Survey, 41 per cent of respondents stated that all persons who killed a policeman or prison guard should get the death penalty as opposed to 17 per cent who would not impose that sanction (38 per cent were in a "depends" category and 4 per cent were in a "not sure" category). (Vidmar and Ellsworth, Public Opinion and the Death

Penalty, 26 Stanford Law Review, 1245, 1251-52.)<sup>1</sup> It should be noted that in the Harris Survey of June 1973, while 41 per cent of respondents favored a mandatory death penalty for all those who killed policemen or prison guards, only 28 per cent of respondents favored capital punishment for all persons committing first-degree murder. *Ibid.* See also Sarat and Vidmar, Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis, 1976 Wisconsin Law Review 171.

In *Gregg*, the plurality opinion in discussing objective indicia concerning the general public support for the death penalty for the crime of murder, noted that since *Furman* was decided in 1972, at least 35 states and the Congress of the United States had enacted legislation reinstating the death penalty. *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2928. As the court in *Gregg* concluded:

" . . . all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people."

Further analysis of these statistics shows an overwhelming basis of support for more severe penalties to be imposed for the killing of law enforcement officers.

Of those 35 states listed in *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2928, fn.23, as having reenacted a new death penalty law since *Furman v. Georgia*, *supra*, 408 U.S. 238 (1972), approximately 29 of these states specified the murder of a peace officer to be either an aggravating circumstance or a

<sup>1</sup> The authors of the above cited article also referred to a May 1973 poll in Minnesota on the issue of mandatory death penalties which showed that 49 per cent of respondents favored "automatic" capital punishment for murder of a law enforcement officer. The authors, although they attack the reliability of that poll, conceded that " . . . these data tend to show considerable support for mandatory death sentences, . . ." *Ibid.* at 1251.

crime which *per se* called for a mandatory death penalty.<sup>2</sup>

Thus, it is urged that in light of common law precedent and present-day indicia of wide public support for this sanction, there should be no constitutional bar for a legislature of its own responsibility to find it necessary to enact a mandatory death sentence for the crime of first-degree murder of a police officer acting in the line of duty.

C. Mandatory Death Sentences For The First-Degree Murder Of A Police Officer Accord With The "Dignity Of Man."

The plurality opinion in *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2925, held that for a capital penalty to pass constitutional muster under "evolving standards of decency" not only must objective indicia reflect the public attitude towards a given sanction is positive, but the penalty must also accord with the "dignity of man." In order to comport with the dignity of man, the punishment must not be "excessive." For a punishment not to be excessive in the abstract at the least, (a) the penalty must not involve the unnecessary and wanton infliction of pain and (b) the punishment must not be grossly out of proportion to the severity of the crime. *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2925.

The plurality in *Gregg* noted at pages 2930-32, that the death penalty for the crime of murder accorded with the dignity of man because it contained social justification in that it

<sup>2</sup> Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska, Nevada, New York, New Hampshire, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, Wyoming. (Florida and Maryland, while not specifically providing for the death penalty for police murders *per se*, do by the wording of their statutes, have for all practical purposes the same effect.) See citation of statutes in *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2928, fn.23.

served two principle social purposes: "Retribution and deterrence of capital crimes for respective offenders." *Ibid.* at 2930. It is urged that consideration of these two social functions indicate that mandatory death sentences for the first-degree murder of law enforcement officers are not deprecatory to the dignity of man.

When a police officer is killed in the line of duty, the crime does not only involve the murder of a private citizen, but instead, the act also constitutes a serious disruption of the orderly processes of government. The importance of this distinction has already been discussed in terms of the common law and high treason. The moral outrage, therefore, in the first-degree murder of a law enforcement officer in the line of duty is not simply one which the relatives or friends of the victim officer must bear. Rather more importantly, the general public at large must suffer since a law enforcement officer gave his life in the course of attempting to protect society. Therefore, society has a right to demand, should it see fit, the imposition of a mandatory death penalty for the narrowly defined crime of first-degree murder of a peace officer acting in the line of duty.

The Legislature should be within its powers in imposing such sanction if it finds it necessary to impart knowledge to law enforcement that if an officer is the victim of a first-degree murder in the course of his duties, retribution will be sure and certain. What this Court stated concerning deterrence as related to the use of capital punishment for the crime of murder is equally applicable to mandatory death sentences for first-degree murder of a peace officer:

"Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. [Footnote omitted.] The results simply have been inconclusive . . . . Although some of the studies suggest that the death penalty may not func-

tion as a significantly greater deterrent than lesser penalties, [footnote omitted] there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no effect. But for many others, the death penalty undoubtedly is a significant deterrent." *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2930, 2931.

It is respectfully urged that a state legislature is well within its powers if it finds that the imposition of a mandatory death penalty is necessary to deter those who would murder peace officers who are acting in the line of duty.<sup>3</sup>

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<sup>3</sup> In *The Death Penalty in America*, 284-315 (H. Bedeau, Ed., 1967) there are printed certain studies conducted over 20 years ago. It was granted by the various authors in the articles describing these studies that there is no greater deterrent effect for the use of the death penalty as relates to peace officers and non-peace officers. However, these studies are subject to great doubt not only because of their age but because different regions, whether it be state, counties or cities, have different problems in the area of crimes and law enforcement. As such, the question of the deterrent effect of the death penalty must be viewed not so much on a national basis but instead, should be a question for the legislature in each state to decide.

Of equal relevance to the legislative function as the statistical report above mentioned, is the circumstance described by Justice McComb in his dissenting opinion in *People v. Love*, 56 Cal.2d 720, 736, 16 Cal. Rptr. 777, 366 P.2d 33 (1961), *overruled on another point* in *People v. Morse*, 60 Cal.2d 631, 649, 36 Cal. Rptr. 201, 388 P.2d 33 (1964). In that dissenting opinion Justice McComb related an incident taken from the records on file in the Los Angeles Police Department:

"(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested on February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officers: 'I want to ask you one question, do you think they will repeal

There is greater reason for mandatory death sentences for first-degree murder of peace officers acting in the line of duty than in other cases. When an individual has been legally arrested by the police, he may hesitate before attempting to escape or engaging in a gun battle with the police if he knows that upon conviction of first-degree murder of a police officer he will get certain death. The strong probability exists therefore that a mandatory death penalty for first-degree murder of a peace officer in the line of duty is a vehicle for saving lives. The prevention of at least some individuals from attempting to escape from police or engaging in gun battles should be sufficient reason alone to posit a deterrent effect of the death penalty in such cases.<sup>4</sup>

Concededly, not all individuals will be deterred from engaging in gun battles or attempting to escape from the authorities simply due to the existence of the death penalty even if the penalty is mandatory. However, that is not the applicable test: Instead, as the Court noted in *Gregg, supra*, there are categories of crime where imposition of the death penalty is undoubtedly a significant deterrent. *Gregg v. Georgia, supra*,

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the capital punishment law. If they do, we can kill all you cops and judges without worrying about it.' "

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<sup>4</sup> A study prepared by the Uniform Crime Reporting Program of the Federal Bureau of Investigation, "Law Enforcement Officers Killed, Summary 1975," indicates that in calendar year 1975, 129 local, state and federal law enforcement officers were feloniously killed in the United States and territories; the comparable total was 132 in 1974. *Ibid.* at p. 1.

The Uniform Crime Reports — 1974, indicates at p. 232 that for the period of 1965 to 1974, 947 officers were slain in the line of duty.

Clearly the crime of first-degree murder of a peace officer acting in the line of duty is sufficiently severe in its very nature for a legislature to impose the sanction it finds necessary to prevent those who would commit it.

96 S.Ct. at 2931. Thus, it is urged that if a legislature, after analyzing all of the relevant factors, determines that a mandatory death sentence would be a more deterring penalty than would be a discretionary death penalty or some other sanction for first-degree murder of a peace officer, that determination should be constitutionally viable so that the people through their lawmakers may mandate what is in their considered opinion added extra protection to law enforcement.

In addition, the three constitutional defects discussed by the plurality opinion in *Woodson v. North Carolina*, *supra*, 96 S.Ct. 2978, 2983-91, concerning the mandatory death statutes in that state are not applicable to the narrowly-drawn legislation setting forth mandatory capital punishment for the first-degree murder of peace officers acting in the line of duty.<sup>5</sup>

The plurality noted in *Woodson* that mandatory statutes are deficient because jurors might be deterred from rendering guilty verdicts of first-degree murder because of the enormity of the sentence automatically imposed. Also, as the court noted in *Woodson*:

" . . . North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and

<sup>5</sup> The first constitutional objection identified by the Court as to mandatory death sentences related to whether or not mandatory death sentences were an accepted sanction by the general public. *Woodson v. North Carolina*, *supra*, 96 S.Ct. at 2983-90. However, as has already been discussed, objective indicia demonstrate acceptance of mandatory death sentences for the first-degree murder of police officers by the general public.

capricious exercise of that power through a review of death sentences." *Ibid.* at 2991.

Therefore, the plurality opinion stated there was total arbitrariness in sentencing and there was no method for the judiciary to check the arbitrary and capricious exercise of the jury's power in deciding the issue of life and death. *Woodson v. North Carolina*, *supra*, 96 S.Ct. at 2990, 2991. However, it is urged that such is not necessarily the case in very carefully and narrowly drawn mandatory death penalties. The plurality opinions both in *Woodson* and in *Roberts* held open the question of the constitutionality of mandatory death sentences for narrowly defined offenses such as intentional murder by persons serving a life sentence or by persons previously convicted of an unrelated murder. *Woodson v. North Carolina*, *supra*, 96 S.Ct. at 2985, 2986 n.25; *Roberts v. Louisiana*, *supra*, 96 S.Ct. at 3006, 3007, n.9.

It is submitted that a first-degree murder statute requiring death for the murder of a peace officer acting in the line of duty is extremely narrow in both the subject Louisiana legislation at the time petitioner was sentenced to death, and in California. In Louisiana (*see Louisiana Revised Statutes Annotated*, § 14:30 (1974)), first-degree murder was defined<sup>6</sup> as it related to the killing of a peace officer as follows:

"First-degree murder. First-degree murder is the killing of a human being: . . . (2) when the offender has the specific intent to kill and inflict great bodily harm upon a fireman or a peace officer who is engaged in the performance of his lawful duties . . . ."

<sup>6</sup> As petitioner points out, the Louisiana Legislature has subsequently amended its capital punishment statute. (Pet. Op. Br. pp. 18, 27.)

In California, before a defendant may be sentenced to die for the killing of a peace officer, he must first be found guilty of first-degree murder. First-degree murder is defined in California Penal Code section 189, as follows:

"All murder which is perpetrated by means of a destructive device or explosive poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

In California, the penalty phase is separated from the guilt phase and does not come into play until the defendant has first been convicted of first-degree murder. (Cal. Pen. Code § 190.1.) For the killing of a peace officer, a defendant can only be sentenced to die if after being found guilty of first-degree murder, the court or jury in the second and separate bifurcated hearing finds true that the defendant personally committed the act which caused the death of the victim (Cal. Pen. Code § 190.2(b)) and that:

"(1) The victim is a peace officer [as defined in the California Penal Code] who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties." (*Ibid.*, section 190.2(b)(1).)

As such, the statutes are very narrowly drawn both in Louisiana and in California.

In the aforementioned Louisiana statutes, before the death penalty could have been imposed, the defendant must be found to have had the specific intent to kill and inflict great bodily harm upon a peace officer who was engaged in

the performance of his lawful duties. In California, before a defendant may be given the death penalty for the killing of a peace officer, he must first be found guilty of first-degree murder as defined by stringent standards. In a separate hearing, the jury or judge must determine whether or not the defendant personally committed the act, whether or not the peace officer was intentionally killed, whether or not the peace officer was engaged in the performance of his duty, and whether or not the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his duties. Thus, both the Louisiana and California statutes are narrowly drawn in order to define the specific offense, and to further a definite social purpose. It is, therefore, unlikely in either of the above statutory approaches that there will be freakish or arbitrary imposition of the death penalty in light of the narrow ambit of the statutes.

In *Woodson*, the plurality opinion said that a third constitutional shortcoming of mandatory death statutes is the failure to allow a particularized consideration of relevant aspects of the character or record of the convicted defendant before imposition of a sentence of death. *Woodson v. North Carolina*, *supra*, 96 S.Ct. at 2991. However, the plurality opinion in *Roberts v. Louisiana*, *supra*, 96 S.Ct. 3006, 3007, n.9, stated that certain narrowly drawn capital crimes were defined in significant part in terms of the character or record of the individual offender and as such, such laws might be justified.<sup>7</sup>

<sup>7</sup> In that same footnote 9, the Court mentions that the third category of first-degree murder in the Louisiana statute, concerning intentional killings by persons serving a life sentence, or by a person previously convicted of an unrelated murder, define a capital crime at least in significant part in terms of the character or record of the individual offender; reference to the killing of peace officers is not made. However, by reason of the limited grant of certiorari in the instant case and the question thereby posed, it appears that this proposition is being considered by this Court.

Under the narrowly drawn statutes of Louisiana and California, the offense of murder of a peace officer is by the very terms of the statutes defined so as to comprise the character of the offender as well as the egregiousness of the offense. The fact that in both California and Louisiana a jury must determine whether or not the murderer *intended* to kill a peace officer engaged in the performance of his lawful duties would in itself demand to a significant degree, analysis of character of the offender. This is so because the jury, in determining whether or not a defendant intentionally killed a peace officer under the law of Louisiana or California, must find not only that the defendant had a callous disregard for human life but also, must by implication find that the defendant had a total disregard for the lawful processes of a democratic government. Thus, resolution of the criminal intent necessary in both Louisiana and California, operates to define to a great degree, the character of the murderer himself.

Thus, it is submitted that narrowly drawn mandatory capital statutes for the first-degree murder of police officers do not carry the same vices discussed by the plurality opinion in *Woodson* concerning mandatory death statutes in general.

Finally, it must be considered whether or not the mandatory punishment of death is disproportionate in relation to the crime for which it is imposed; namely, the first-degree murder of a peace officer engaged in the line of duty. In *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2909, 2931, 2932, the plurality opinion stated that imposition of capital punishment for the crime of murder when a life has been taken deliberately by the offender cannot be said to be invariably disproportionate to the crime. In the same manner, mandatory death sentences for the first-degree murder of peace officers as defined under the statutes of both Louisiana and California are not disproportionate to the crime because by the act of the offender the constitutional processes of a democratic government have been violently attacked and distorted. As such, it is urged that this analysis establishes a meaningful distinction

between the narrowly defined crime of first-degree murder of a peace officer, and other first-degree murders, and accordingly imposition of a mandatory death sentence for the former offense is neither disproportionate nor beyond the power of a state legislature to enact.

In a recent case, in which the Canadian Supreme Court rejected a contention that the mandatory imposition of the death penalty for the murder of a police officer constituted cruel and unusual punishment as defined by the Canadian Bill of Rights,<sup>8</sup> Chief Justice Laskin observed in a concurring opinion:

"It is certainly arguable that the mandatory death penalty, considered as mere vengeance, should be regarded as cruel and unusual punishment within s.2(b), having regard to its enormity and its reversibility, its incompatibility with any aim of rehabilitation and its physical and mental pain. I do not think, however, that it can be said that Parliament, in limiting the mandatory death penalty to the murder of policemen and prison guards, had only vengeance in view. There was obviously the consideration that persons in such special positions would have a sense of protection by reason of the grave penalty that would follow their murder and, further, that the mandatory penalty would be, to some extent at least, a deterrent as, for example, to a prison inmate already serving a life sentence but tempted to escape even if this meant committing murder. It was open to Parliament to act on these additional considerations in limiting the mandatory death penalty as it did, and I am unable to say that

<sup>8</sup> While the Canadian Parliament had repealed the death penalty during the pendency of the appeal, the Canadian Supreme Court nevertheless reached the Bill of Rights contention in its opinion.

they were not acted upon. On this view, I cannot find that there was no social purpose served by the mandatory death penalty so as to make it offensive to s.2(b).

"The appellants sought to strengthen their position by invoking the public conscience or public morality as reflecting a revulsion against capital punishment. No doubt, this is a strongly held position by an undetermined section of the public so far as the death penalty in general is concerned but the issue is not so free of debate as to enable me to say that the moral position is clear. Indeed, I can, I believe, properly take judicial notice of the fact that there is a substantial opinion that the imposition of the death penalty for the murder of policemen or prison guards is neither shocking nor abhorrent. This is adequate ground for being wary about interfering with a legislative policy that prescribes the death penalty in such cases." *Miller and Cockriell v. The Queen*, — D.L.R. 3d —, concurring opinion at pp. 17-18; judgment pronounced October 5, 1976.

The concurring opinion also recognized that the crime of murder of a police officer is itself a very narrowly defined crime for which the mandatory imposition of the death penalty is appropriate:

"Since we are concerned here with a situation where the death penalty is mandatory, I need not embark on any consideration of questions of uneven application of authorized punishments or questions of discretionary, arbitrary or capricious application of the death penalty. It cannot be argued that arbitrary or capriciousness resides in the limitation of the death penalty to the murder of policemen and prison guards, persons who are specially entrusted with the enforcement of the criminal law

and with the custody and supervision of convicted persons. The progressive restriction of the situations in which the death penalty could be imposed in this country . . . , does not point to an erratic imposition when it was mandatory in the narrow classes of cases for which it was authorized." *Ibid*; concurring opinion at pp. 8-9.

While Canada has standards pertaining to criminal justice not necessarily identical to our own federal constitutional standards, amicus curiae respectfully submits that the reasoning of the Canadian Supreme Court lends support to the thesis that a legislature may, consistent with its obligations, mandate a penalty of death for a narrowly defined grievous crime which necessarily involves a serious disruption of the orderly processes of a democratic society.

## CONCLUSION

The question involved in this case is not whether a legislature *should*, but instead whether or not a legislative body *may* enact mandatory death penalty legislation for the first-degree murders of police officers. It has been shown that mandatory death sentences under these limited circumstances are a sanction accepted by the general public which accords with the dignity of man. Thus, if a legislature finds that it can better protect its law enforcement officers by use of mandatory capital statutes which are narrowly drawn, it should be permitted to so enact. For, as the plurality opinion stated in *Gregg v. Georgia*, *supra*, 96 S.Ct. at 2926:

"Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people."

For these reasons, amicus curiae, the People of the State of California, joins respondent, the State of Louisiana, in its assertion that mandatory death penalties for the first-degree murder of a peace officer are not violative of the Federal Constitution.

Respectfully submitted,

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